

**BEFORE THE APPEALS BOARD
FOR THE
KANSAS DIVISION OF WORKERS COMPENSATION**

THOMAS L. MARKUS
Claimant

VS.

INTERSTATE BRANDS CORPORATION
Respondent
Self-Insured

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Docket No. 220,038

ORDER

Claimant appealed from a preliminary hearing Order of Administrative Law Judge Robert H. Foerschler dated July 7, 1997, wherein the Administrative Law Judge denied claimant benefits finding claimant had failed to prove that he suffered a compensable injury or that he provided notice to the employer as is required by statute.

ISSUES

- (1) Whether claimant suffered personal injury by accident arising out of and in the course of his employment on the date alleged.
- (2) Whether claimant provided notice of this accident in a timely fashion pursuant to K.S.A. 1996 Supp. 44-520.

FINDINGS OF FACT AND CONCLUSIONS OF LAW

Based upon the evidence presented and for the purpose of preliminary hearing, the Appeals Board finds as follows:

The Appeals Board finds that claimant has failed to prove by a preponderance of the credible evidence that he suffered accidental injury arising out of and in the course of his employment on the date alleged or that he provided notice to respondent as required by K.S.A. 1996 Supp. 44-520.

Claimant originally suffered accidental injury to his shoulder while working for respondent and was off work from June 1996 through December 23, 1996, at which time he

was returned to work turning donuts. Claimant worked at the donut cooking job for approximately two hours on the morning of December 23, 1996, when he left his employment alleging increased pulmonary symptomatology from the cooking oils and fumes. Claimant alleged that he advised several employees of respondent of his pulmonary condition and the fact he was going home but was unable to identify any of the individuals to whom he discussed this matter. Respondent provided the affidavits of Dennis Reid the production supervisor and Don Pederson both stating claimant failed to advise them of any accidental injury and that claimant had simply left work on the morning of December 23 at break time.

Claimant's history is significant in that he has had pulmonary problems since 1984 when he was advised by Dr. Osbern to quit smoking. Claimant did stop smoking at the time but started again either in 1989 as was testified to in his discovery deposition or in 1991 as was testified to at the preliminary hearing. In either instance claimant admits to having started smoking again and continued smoking up until seven days prior to the preliminary hearing which was held July 3, 1997.

In workers compensation matters it is claimant's burden to prove by a preponderance to the credible evidence his entitlement to the benefits requested. See K.S.A. 1996 Supp. 44-501 and K.S.A. 1996 Supp. 44-508(g).

The Appeals Board finds, based upon a review of the record and for preliminary hearing purposes, that claimant has failed to prove that his ongoing pulmonary symptomatology relates to an injury suffered while employed with respondent. The Appeals Board further finds that claimant has failed to prove pursuant to K.S.A. 1996 Supp. 44-520 that he gave notice to the respondent within ten days of the accident as is required by the statute. The only definitive notice claimant is able to verify is that of February 4, 1997, which is well beyond the 10-day limitation from a December 23, 1996, accident.

WHEREFORE, it is the finding, decision, and order of the Appeals Board that the Order of Administrative Law Judge Robert H. Foerschler dated July 7, 1997, should be, and is hereby, affirmed.

IT IS SO ORDERED.

Dated this ____ day of September 1997.

BOARD MEMBER

c: James E. Martin, Overland Park, KS
James C. Wright, Topeka, KS
Robert H. Foerschler, Administrative Law Judge
Philip S. Harness, Director